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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MARCEL BEARD,

Defendant and Appellant.

F074488

(Super. Ct. No. F06905403)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Carol Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Franson, J. and Smith, J.

Appellant Anthony Marcel Beard appeals from the denial of his motion for reduction of sentence pursuant to Penal Code section 1170.18.¹ On appeal, Beard contends the court erred by its failure to strike one of his prior prison term enhancements and correspondingly reduce his sentence by one year. We affirm.

FACTS²

On March 15, 2007, a jury convicted Beard of kidnapping (§ 207, subd. (a)/count 1) and inflicting corporal injury on a spouse or cohabitant (§ 273.5, subd. (a)/count 2).³ A great bodily injury enhancement (§ 12022.7, subd. (e)) in count 2 and five prior prison term enhancements (§ 667.5, subd. (b)) were also found true. One prison term enhancement was based on Beard's 1992 conviction for possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)).

Following an appeal, on remand Beard was sentenced on July 21, 2009, to an aggregate prison term of 14 years four months. We have not been advised that any appeal of the sentence was filed and we assume the judgment is final as of 2009.

On June 15, 2015, the court granted Beard's motion to reduce his 1992 possession of a controlled substance conviction to a misdemeanor.

On May 24, 2016, Beard filed a pro se "PETITION FOR REDUCTION OF SENTENCE ..." pursuant to section 1170.18 asking the court to strike the prison term enhancement that was based on his 1992 possession of a controlled substance conviction.

On September 14, 2016, the court denied the petition.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² The facts pertaining to Beard's convictions are omitted because they are not germane to the issue Beard raises on appeal.

³ Beard was also convicted of false imprisonment (§ 236/count 4). However, following Beard's partially successful appeal on July 15, 2009, the trial court dismissed this conviction because this court held that Beard's false imprisonment offense was a lesser included offense of the kidnapping offense Beard was convicted of in count 1.

Beard contends the electorate intended Proposition 47 to reduce certain drug- and theft-related offenses for all purposes, except firearm related offenses. According to Beard, this interpretation of Proposition 47 is supported by the rule of *expressio unius est exclusio alterius*, the rule favoring liberal interpretation of a remedial statute, and the rule of lenity. Beard further contends that his interpretation of Proposition 47 avoids an interpretation that would raise difficult questions of constitutional law. Thus, according to Beard, the court erred by its failure to strike the prior prison term enhancement that was based on his 2002 possession of a controlled substance conviction and reduce his sentence by one year because that conviction no longer supports the enhancement. We disagree.

DISCUSSION

Standard of Review and Applicable Law

“In November 2014, California voters enacted Proposition 47, which ‘created a new resentencing provision: section 1170.18. Under section 1170.18, a person “currently serving” a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be “resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” ’ ” (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448.)

Subdivision (k) of section 1170.18, provides in pertinent part: “Any felony conviction that is ... designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.”

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) However, a petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.)

As the trial court's eligibility determination is factual in nature, we review that determination for substantial evidence. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960; see *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331; *People v. Hicks* (2014) 231 Cal.App.4th 275, 286.)

The Trial Court Did Not Err in Denying Beard's Motion

The question raised in this appeal is whether Proposition 47 operates retroactively such that Beard's current sentence, enhanced pursuant to section 667.5, subdivision (b), must now be altered because subsequent to Beard's sentencing the conviction that gave rise to an enhancement pursuant to that section was reduced to a misdemeanor pursuant to section 1170.18, subdivision (f).⁴ This question has been previously considered by this court and answered in the negative. That case, and several discussing the same issue, are now on review before the California Supreme Court.⁵

There is no need to fully recount the analysis previously laid out by this court. In sum, there is no evidence of a voter intent to make Proposition 47 retroactive in the

⁴ Section 1170.18, subdivision (f) provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

⁵ See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Johnson* (2017) 8 Cal.App.5th 111, review granted April 12, 2017, S240509.

context of section 667.5, subdivision (b). Neither Proposition 47 nor the ballot materials refer to section 667.5, subdivision (b) or mention recidivist enhancements, and Proposition 47 made no amendments to any such provisions. Two of Proposition 47's expressly stated purposes, however, are to "[a]uthorize *consideration* of resentencing for anyone who is currently serving a sentence for any of the offenses" that would be made misdemeanors by Proposition 47, and to "[r]equire a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subds. (4), (5), p. 70, italics added.) Voters were assured Proposition 47 would keep dangerous criminals locked up (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 47, p. 38), and that it would not require automatic release of anyone: "There is no automatic release. [Proposition 47] includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (*Id.*, rebuttal to argument against Prop. 47, p. 39.)

"Imposition of a sentence enhancement under ... section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) "Sentence enhancements for prior prison terms are based on *the defendant's status as a recidivist, and not on the underlying criminal conduct*, or the act or omission, giving rise to the current conviction." (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936, italics added; see *People v. Coronado* (1995) 12 Cal.4th 145, 158-159; *People v. Dutton* (1937) 9 Cal.2d 505, 507.) Thus, the purpose of an enhancement under section 667.5, subdivision (b) "is 'to punish individuals' who have shown that they are 'hardened criminal[s] who [are] undeterred by the fear of prison.' " (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) The enhancement's focus on the service of a prison term "indicates the special

significance which the Legislature has attached to incarceration in our most restrictive penal institutions.” (*People v. Levell* (1988) 201 Cal.App.3d 749, 754.)

A person who refuses to reform even after serving time in prison is clearly and significantly more dangerous than someone who merely possesses drugs for personal use or shoplifts. We cannot conclude, from the language of Proposition 47 or the ballot materials, that voters deemed such persons to be nonserious, nondangerous offenders, and so intended Proposition 47 to reach back to ancillary consequences such as enhancements resulting from recidivism considered serious enough to warrant additional punishment.

Nor do cases cited by Beard such as *People v. Park* (2013) 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 change this conclusion. Such cases, in contrast to the situation here, involved sentencing decisions occurring *after* reduction of a previous felony to a misdemeanor. Nothing in these cases, or in Proposition 47, suggests sentencing occurring *prior* to any reduction of a previous felony conviction should be affected. Beard served a prison term for the prior conviction at a time when the offense was a felony. It is the service of that prison term, coupled with Beard’s continuing recidivism, that section 667.5, subdivision (b) punishes. Absent a clear statement of the electorate’s intent to the contrary—which we do not find—we conclude that, because Beard served a prison term at a time when the offense was a felony and had his current sentence enhanced accordingly before the conviction was reduced, he is not entitled to relief.

DISPOSITION

The judgment is affirmed.